Supreme Court, U.S.
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No. 06-600

In The

Supreme Court of the United States

CHRISTOPHER PAUL SCHNEIDER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the admission of Christi Schneider's preliminary hearing testimony violate Petitioner's Sixth Amendment right to confront the witnesses against him?

LIST OF PARTIES

The petitioner is Christopher Paul Schneider, who was convicted of rape in violation of Va. Code Ann. § 18.2-61 (1999). The respondent is the Commonwealth of Virginia.

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PETITION FOR WRIT OF CERTIORARI

Christopher Paul Schneider (hereinafter "Schneider" or "Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals of Virginia, which held that Schneider's Sixth Amendment right to confront the witnesses against him was not violated by the introduction at trial of the preliminary hearing testimony of his accuser, Christi Schneider (hereinafter "Christi").

OPINIONS BELOW

The Court of Appeals of Virginia held that Petitioner's Sixth Amendment right to confront the witnesses against him was not violated by admitting the preliminary hearing testimony of Christi Schneider at trial. The court's opinion is reprinted in the Appendix at App. 1. By order dated August 1, 2006, the Supreme Court of Virginia refused Schneider's petition for appeal. That order is reprinted in the Appendix at App. 14.

JURISDICTION

The order of the Supreme Court of Virginia refusing Schneider's petition for appeal was entered on August 1, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution of the United States provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"

STATEMENT OF THE CASE

Christopher Paul Schneider was charged with one count of rape in violation of Va. Code Ann. § 18.2-61 (1999). On October 3, 2002, a preliminary hearing was held in the Juvenile and Domestic Relations District Court of the City of Virginia Beach. At the hearing, the Commonwealth called Christi Schneider, the accuser and Schneider's stepdaughter, as its only witness. Christi was sworn in and proceeded to testify regarding the alleged rape. Defense counsel was allowed to cross examine Christi. After considering the evidence, the court certified the case. Preliminary Hearing Transcript (P/H Tr.) at 19:4.

A bench trial was held on December 3, 2002, in the Circuit Court of the City of Virginia Beach. The Commonwealth called Christi as its first witness. Trial Transcript (T. Tr.) at 15:1-3. She was sworn in and answered several questions regarding her name, age, and background. T. Tr. at 15:1-16:4. However, when questioned about the rape allegation, Christi refused to testify. She stated that she would not testify because "I cannot handle it mentally, I don't think I'm capable of handling it." T. Tr. at 17:17-18. Christi explained that "[i]t's stressful, and I just – it's just hard; and I'm not going to do it." T. Tr. at 17:20-21. When asked why she couldn't handle the stress, Christi responded "[i]t's because I'm just going through a lot of stuff right

now, and this is just one thing I cannot handle and – ." T. Tr. at 18:1-3. Elaborating on her statement that she was "going through a lot of stuff right now," Christi testified about living without her mom and brother, living in a new home with someone she had not known for a long time, and attending a new school. T. Tr. at 18:4-19:12. She admitted to being hospitalized for mental health issues when she was nine but denied having been diagnosed with any stress-related disorders. T. Tr. at 20:21-21:5.

The Commonwealth asked the trial court to order Christi to testify, which it did. T. Tr. at 22:18-19. However, Christi again refused. T. Tr. at 22:19-20. Immediately thereafter, the Commonwealth, obviously aware before trial that Christi was going to refuse to testify, moved the court to declare Christi unavailable and to admit her prior testimony from the preliminary hearing. T. Tr. at 23:10-23. The Commonwealth stated:

> Your Honor, at this point the Commonwealth is going to request the court to declare Miss Schneider's testimony unavailable. She has made it clear that despite the court order, she refuses to testify. The Commonwealth has done everything possible. We have gotten her here. I have met with her in advance. I have explained, as the court could see from her testimony, . . . what the consequences of not testifying about her stepfather's actions would be; and yet she still continues to refuse.

T. Tr. at 22-23:9. The Commonwealth then referred the trial court to various Virginia Supreme Court opinions which it argued supported its assertion that Christi should be declared unavailable and that her preliminary hearing testimony be admitted. T. Tr. at 23:10-24:1. Defense

counsel, caught completely off guard, stated that "[t]hese are the [cases] that [the Commonwealth] gave me this morning, Your Honor. I have not reviewed these, but I would like to respond to what she stated." T. Tr. at 24:2-5. He continued: "[S]ince the preliminary hearing, a lot of stuff has come to light that I need to have answered by the witness and – with reference to her direct examination. And since she is not testifying, I – there's many more things that can come out that was not known to me at the time of preliminary hearing that I need to be able to ask; and I do not feel that it would be fair to the defendant to allow that testimony of the preliminary hearing in by itself without being able to cross-examine her." T. Tr. at 24:11-23.

The court recessed in order to review the preliminary hearing transcript and to allow defense counsel to review the cases relied upon by the Commonwealth. T. Tr. at 25:6-11. The court ordered that Christi be placed in lockup while the court was in recess in order to "give her a chance to reflect upon what she's done." T. Tr. at 25:20-21. Approximately 30 minutes later, the court reconvened. Christi still refused to testify. T. Tr. at 26:13-23.

Defense counsel again objected to admitting the preliminary hearing testimony noting that Christi appeared to be very strong-willed, did not appear fearful of anybody or anything, and had apparently just decided not to testify. T. Tr. at 27:15-19. He also continued to argue that "it's very important that I be able to cross-examine her." He explained: "We have contradictory evidence as to what she's told in the preliminary hearing, and I need to be able to impeach her and to ask her questions about other people's statements as to what she's told them; and I can't do that – or it's going to be difficult to do that without

her testifying today." T. Tr. at 27:23-28:5. Nevertheless, the trial court granted the Commonwealth's motion to declare Christi unavailable and admitted the transcript of Christi's testimony from the preliminary hearing. T. Tr. at 29:1-21.

The court found Schneider guilty of rape. The record reflects that the court's finding of guilt was based almost exclusively on Christi's testimony. T. Tr. at 114:12-15. At Schneider's sentencing hearing, defense counsel moved the court to set aside the finding of guilt on the ground that admitting Christi's testimony from the preliminary hearing violated Schneider's Sixth Amendment right to confront the witnesses against him. Sentencing Transcript (S. Tr.) at 4:1-8. That motion was denied and Schneider was sentenced to twenty-five years in prison, all but twelve years suspended, supervised probation for twenty-five years, and ordered to report as a registered sex offender pursuant to the Code of Virginia. S. Tr. at 76:19-77:11.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The admission of Christi Schneider's preliminary hearing testimony violated Petitioner's Sixth Amendment right to confront the witnesses against him.

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This right "is basically a trial right." *Barber v. Page*, 390 U.S. 719, 725 (1968). Testimonial statements of witnesses who do not appear at trial are barred unless "that witness was

unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

A. The nature and scope of preliminary hearings do not allow for the full and fair cross examination necessary to satisfy the requirements of the Confrontation Clause.

The "primary object" of the Confrontation Clause is to prevent evidence from being used against a defendant without the defendant having the opportunity to cross examine the witness. Cross examination serves "not only . . . [to test] the recollection and [to sift] the conscience of the witness, but [to compel] him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). It is, as the Court has stated, "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970).

The Court has recognized that "[a] preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *Barber*, 390 U.S. at 725. Additionally, one of the main objectives of the Confrontation Clause, to allow the fact finder to observe the witness and to weigh his or her demeanor, *see, Mattox*, 156 U.S. at 242-43, is entirely absent in a preliminary hearing which is typically held in a different court and before a different judge than the actual trial. For these reasons, some state courts have excluded preliminary

hearing testimony even when the witness is unavailable to testify at trial. *See*, *e.g.*, *State v. Stuart*, 695 N.W.2d 259, 265 (Wis. 2005) (finding that because cross examination at preliminary hearings tests "plausibility, not credibility," the opportunity to cross examine at that time does not satisfy *Crawford*); *People v. Fry*, 92 P.3d 970 (Colo. 2004) (finding that because of the limited nature of preliminary hearings in Colorado, the d fendant does not enjoy adequate motive or opportunity to cross examine during preliminary hearings).

Moreover, in states such as Virginia that allow for extremely limited discovery prior to the preliminary hearing, the ability to cross examine a witness at trial rather than during the preliminary hearing is particularly important. In Virginia, the only discovery available to an accused prior to the preliminary hearing is the ability to hear, inspect, or copy "any relevant written or recorded statements made by the accused . . . to any law enforcement officer," and "any criminal record of the accused." Rule 7C:5 of the Rules of the Supreme Court of Virginia. The result of this limited discovery is that the preliminary hearing is often the first look a defendant, and his attorney, has at the evidence against him or even the true nature of the case. Therefore, any opportunity a defendant or defense counsel may have to cross examine a witness at that time is handicapped by an obvious inability to prepare adequately for that examination. Following the preliminary hearing, however, the defendant is entitled to expanded, albeit still quite limited, discovery. *See*, Rule 3A:11 of the Rules of the Supreme Court of Virginia. Further, information garnered during the preliminary hearing, through the discovery process, or independent investigation often yields evidence which calls into question

the evidence presented against the defendant during the preliminary hearing. That new information may include evidence which discredits testimony given by witnesses during the preliminary hearing. Because that information was not known to the defendant or his attorney during the preliminary hearing, the witness could not be cross examined on that point. If the preliminary hearing testimony is admitted as evidence at trial, the witness can avoid cross examination on those points altogether. Not only is the defendant deprived of his opportunity to confront the witness regarding the new information, the fact finder is deprived of its opportunity to observe the witness's demeanor when presented with the new information; therefore, the fact finder cannot adequately ascertain the witness's credibility.

This concern is clearly illustrated in the present case. Following the preliminary hearing, defense counsel became aware of evidence that called into question Christi's testimony during the preliminary hearing. It was revealed that Christi had made similar accusations against Petitioner and another man three times before but had recanted each time. T. Tr. at 46:6-9, 91:24-92:7. Further, defense counsel uncovered a witness, Sheila Richards, Christi's mother's best friend, who testified at trial that Christi bragged to her two weeks after the alleged rape that she had "set him up" and that she had voluntarily performed oral sex on the Petitioner on the night of the alleged rape. T. Tr. at 84:8-14, 87:6-14, 88:17-22. Although this testimony was presented at trial, by refusing to testify, Christi avoided ever having to answer any questions regarding this new evidence and avoided having her prior testimony impeached. The trier of fact, in this case the judge, did not have the opportunity to observe Christi's

demeanor when faced with this new evidence and therefore could not properly judge her credibility.

Finally, allowing preliminary hearing testimony to be admitted in lieu of actual testimony at trial sets a dangerous precedent ripe for abuse. Witnesses, or even some unscrupulous prosecutors, may use this as a trial strategy in order to avoid having prior testimony impeached or having to answer to evidence uncovered after the preliminary hearing. At a minimum, the Court should limit the admissibility of preliminary hearing testimony to cases where the witness, due to death or some other meritorious reason, is truly unavailable at trial. Such testimony should be barred in cases, like the present one, where the witness simply refuses to testify.

B. Since *Crawford* was decided, a split has emerged among the states regarding whether preliminary hearing testimony satisfies *Crawford's* requirement of cross examination.

In *Crawford,* the Court interpreted the Confrontation Clause to require a showing of unavailability of the witness and a prior opportunity for cross examination. Since that decision, a split has emerged among the courts of various states as to whether testimony given during a preliminary hearing satisfies *Crawford's*, and the Confrontation Clause's, requirement of cross examination.

The Supreme Court of Wisconsin considered the issue in *State v. Stuart*, 695 N.W.2d 259 (Wis. 2005). The Court reversed its prior holding in the case, decided under the reliability analysis of *Ohio v. Roberts*, 448 U.S. 56 (1980), and found that the defendant's cross examination of the witness during the preliminary hearing was insufficient to

satisfy his right of confrontation as interpreted by *Crawford*. *Id.* at 265. The Court based its decision on the limited nature of cross examination during preliminary hearings. *Id.* at 265-66. The Court noted that "the preliminary hearing 'is intended to be a summary proceeding to determine essential or basic facts' relating to probable cause, not a 'full evidentiary trial on the issue of guilt beyond a reasonable doubt.'" *Id.* at 266 (quoting *State v. Dunn*, 359 N.W.2d 151 (Wis. 1984)). The Court further noted that any cross examination attacking the "general trustworthiness" of a witness is "off limits" during a preliminary hearing. *Id.* (citations omitted). Similarly, since the Court's decision in *Crawford*, the Supreme Court of Colorado has affirmed previous decisions of that court holding that cross examination during preliminary hearings does not satisfy the requirements of the Confrontation Clause. *People v. Fry*, 92 P.3d 970 (Colo. 2004).

However, in *State v. Henderson*, 136 P.3d 1005 (N.M. Ct. App. 2006), the Court of Appeals of New Mexico declined to follow the example set by Wisconsin and Colorado.[1] The court concluded that "the admission of a 'testimonial' statement given by a witness under oath in a preliminary hearing does not violate the Confrontation Clause under Crawford where: (1) the witness is unavailable; and (2) the defendant had a prior opportunity to cross examine." *Id.* at 1010. Because the defendant was given an opportunity to cross examine the statements

[1] The Court of Appeals stated that it believed its decision was "not contrary" to those decisions because both *Stuart* and *Fry* relied upon the limited nature of the applicable procedural rules governing preliminary hearing testimony to find that *Crawford* had not been satisfied. *Id.*

made during the preliminary hearing, that testimony satisfied *Crawford* and the Confrontation Clause. *Id.* at 1010-11. This is essentially the same rationale relied upon by the Court of Appeals of Virginia in the present case. The court found that Virginia law regarding the admissibility of preliminary hearing testimony has always required both unavailability and an opportunity for cross examination. *Schneider v. Commonwealth*, 625 S.E.2d 688, 613 (Va. Ct. App. 2006) (citing *Longshore v. Commonwealth*, 530 S.E.2d 146, 146 (Va. 2000)). Thus, under both New Mexico and Virginia law, *Crawford* is satisfied so long as the defendant had the opportunity for cross examination during the preliminary hearing. Neither state requires a showing that the opportunity for cross examination was adequate.

Because there is a split among the states regarding whether *Crawford* precludes the admission of preliminary hearing testimony, guidance is needed from the Court in order to resolve this conflict. The Court should resolve the conflict by holding that cross examination during preliminary hearings does not satisfy the Confrontation Clause's cross examination requirement as outlined in *Crawford*.

C. Christi was not "unavailable" to testify at trial.

Even assuming that cross examination of a witness during a preliminary hearing satisfies the requirements of the Confrontation Clause, that testimony is only admissible when that witness is unavailable to testify at trial. *Barber*, 390 U.S. at 725-26. Christi Schneider was not "unavailable" at trial. Not only did she appear, but she answered several questions regarding her name, age, and

background. It was only after the questioning turned to her allegations against the defendant that she refused to testify.

The court had various tools, including contempt, that it could have used to convince Christi to testify. It used none of them. Holding reluctant witnesses in contempt is perhaps the strongest tool a court has at its disposal for compelling a witness to comply with the court's order to testify. Witnesses who refuse to comply with an order to testify can be held in custody until they agree to testify. *See*, Va. Code Ann. § 18.2-457 (1999) (authorizing imprisonment upon finding of contempt). The trial court in this case merely asked Christi to testify and, when she refused, placed her in solitary confinement for approximately 30 minutes. The court did not even inform Christi of the possible consequences of refusing to testify. Christi testified that she believed the worst that would happen is that she would be fined or sent to a juvenile detention center. T. Tr. at 21:14-23. She did not indicate that she knew the length of incarceration she may face if found in contempt. Virginia Code § 18.2-457 allowed the court to confine Christi for up to ten days upon a finding that she was in contempt. If she still refused to testify, she could have been found in contempt again and been confined for an additional period. Faced with this knowledge, it is possible that Christi would have agreed to testify. *See, United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980) (stating that "[i]t is always possible that a recalcitrant witness who does not respond to judicial pressure will testify when ordered to do so rather than face contempt proceedings for refusal to obey the court's order"). Further, it is possible that had Christi actually been placed in custody for any

meaningful period of time she would have reconsidered her refusal to testify.

The court had other options, short of incarceration, that it could have used to compel Christi to testify. Had the court inquired further into the reasons for Christi's refusal, it is possible that some arrangement could have been made that would have alleviated Christi's concerns and may have satisfied Petitioner's constitutional rights. While not all substitutes for face-to-face confrontation will suffice, this Court has approved, for example, the use of testimony via close circuit television in cases involving child victims of abuse. *Maryland v. Craig*, 497 U.S. 836 (1990). Although Christi, who was seventeen at the time of trial, is not a young child, *Craig* is instructive because it illustrates one option available to courts when a witness cannot testify because a face-to-face confrontation with the accused would be too traumatic.

Christi Schneider was not "unavailable" to testify. She was present during the trial and even took the stand and answered questions regarding her name, age, and background. She refused to testify, however, regarding the allegations she had made against the petitioner. The record reflects that Christi's decision was her own and that it was not the result of any threats to her safety or the assertion of any privilege. Rather, her refusal was based entirely on her belief that testifying was "stressful, and I just – it's just hard; and I'm not going to do it." The court did little to inquire as to the reasons for her refusal or to compel her testimony. Instead, the court merely accepted Christi's decision and found her to be unavailable. Prior to making this determination, however, the court should have explored the various options available to it including holding Christi in contempt or, if Christi could

not be convinced to testify under normal conditions, fashioning an arrangement that would have permitted Christi to testify while preserving Petitioner's rights to confrontation and cross examination of the witnesses against him.

D. The Court should adopt a uniform standard for determining when a witness is "unavailable."

Although the Court has held that the Confrontation Clause demands a showing of unavailability before prior testimonial statements can be admitted at trial, *Crawford*, 541 U.S. at 68, it has never stated the standard by which courts should determine unavailability. The Court appears to have based its determination of unavailability on a case-by-case basis, never actually articulating a governing standard. *See, Mattox*, 156 U.S. at 244 (unavailability established where witness died prior to trial); *Barber*, 390 U.S. at 724-25 (unavailability not established where prosecutor made no "good faith effort" to obtain incarcerated prisoner's presence at trial). The Court should clarify exactly how courts are to determine unavailability and should adopt a clear standard for making that determination.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER PAUL SCHNEIDER

Of Counsel

October 27, 2006

Schneider v. Commonwealth,
47 Va. App. 609, 625 S.E.2d 688 (2006)

IN THE COURT OF APPEALS OF VIRGINIA
ARGUED AT CHESAPEAKE, VIRGINIA

CHRISTOPHER PAUL SCHNEIDER

v.

COMMONWEALTH OF VIRGINIA

Record No. 0628-05-1
Decided: February 7, 2006*

Present: Judges Elder, Clements and Haley

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH, A. Bonwill Shockley, Judge

Affirmed.

COUNSEL

Brandon H. Zeigler (Wolcott Rivers Gates, on brief), for appellant.

Susan L. Parrish, Assistant Attorney General (Judith Williams Jagdmann, Attorney General; Denise C. Anderson, Assistant Attorney General, on brief), for appellee.

OPINION

HALEY, J. – The sole issue here for determination is whether the trial court erred in finding a witness was "unavailable" and in consequently admitting into evidence a transcript of her preliminary hearing testimony at trial. Finding no error, we affirm appellant's conviction of a violation of Code § 18.2-61.

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* [Editor's Note: Appealed to the Supreme Court of Virginia]

I.

Appellant was charged with raping his stepdaughter, C.S., in violation of Code § 18.2-61. At the October 3, 2002 preliminary hearing in the juvenile and domestic relations district court, the Commonwealth called only C.S. to testify. She stated that on April 25, 2002, while her mother was away from the house on an errand, appellant called her upstairs to his bedroom, fondled her, ordered her to take off all of her clothes, and had sexual intercourse with her. Because this pattern had occurred in the past, C.S. testified, she made efforts to preserve physical evidence of the encounter. She then ran to a neighbor's house and called her therapist, who called the police. After the Commonwealth completed its direct examination, appellant's counsel (who represented appellant at both the preliminary hearing and at trial) cross-examined C.S. Two rounds of re-direct and re-cross examination took place during the preliminary hearing. At the close of the hearing, the court certified the case.

During appellant's trial on December 3, 2002, the Commonwealth called C.S. to testify. C.S. was age 17 at the time. She answered background questions but refused to testify further once the topic turned to appellant. The Commonwealth reminded her that she was under a subpoena, but she still would not talk about the rape. C.S. said she did not "feel comfortable testifying," that she could not "handle it mentally," and that she was "going through a lot of stuff right now." After exploring her mental diagnoses and living situation, the Commonwealth asked if C.S. was aware of the consequences of refusing to testify. C.S. responded that possible punishments included fines and being sent to a detention home, but still would not testify.

At this point, the Commonwealth asked the trial court to order C.S. to testify. The trial court impressed upon her the seriousness of the charge, and then ordered her to testify. C.S. declined to follow the order, and the Commonwealth immediately moved to admit the preliminary hearing testimony into evidence. The court recessed to consider the Commonwealth's arguments, review the case law, and allow appellant's counsel to consider counter-arguments. During this approximately half hour recess, C.S. was placed in the lockup in an attempt to change her mind. After the break, C.S. still refused to testify, and both sides declined to ask her questions. After hearing the additional argument of counsel, the trial court found that C.S. was unavailable and admitted her preliminary hearing testimony.

The bench trial continued, including the testimony of Connie Andrews, a sexual assault nurse examiner. Andrews collected a sample of a dried substance from C.S.'s stomach, which was the evidence C.S. preserved from the encounter. An analysis of the sample revealed it to be appellant's semen.

Appellant's defense consisted of only one witness: Sheila Richards, C.S.'s guardian at the time of trial. Richards testified about a conversation she had with C.S. about two weeks after the incident in question. Richards said that C.S. talked of having "set him [appellant] up" and gave a different explanation for the origin of the semen sample.

After the defense rested, the trial court found appellant guilty of rape. Appellant appeals from this conviction.

II.

Appellant contends that the trial court's admission of C.S.'s preliminary hearing testimony violated his Sixth Amendment right to confront witnesses against him.

In *Crawford v. Washington,* 541 U.S. 36 (2004), the United States Supreme Court recently addressed the conditions necessary, under the Sixth Amendment's Confrontation Clause, for the admission at trial of "testimonial" evidence given outside of trial. The Court held that two conditions were necessary to satisfy constitutional demands: the unavailability of the witness and the defendant's prior opportunity to cross-examine the witness. *Id.* at 68. Although stated in dicta, *Crawford* clearly considers preliminary hearing testimony to be "testimonial." *Id.* For preliminary hearing testimony to be admissible, then, it must meet *Crawford's* dual requirements of unavailability and opportunity for cross-examination.

More specifically, the Virginia Supreme Court has stated:

> The preliminary hearing testimony of a witness who is absent at a subsequent criminal trial may be admitted into evidence if the following conditions are satisfied: (1) that the witness is presently unavailable; (2) that the prior testimony of the witness was given under oath (or in a form of affirmation that is legally sufficient); (3) that the prior testimony was accurately recorded or that the person who seeks to relate the testimony of the unavailable witness can state the subject matter of the unavailable witness's testimony with clarity and in detail; and (4) that the party against whom the prior testimony is offered was present, and represented by counsel,

> at the preliminary hearing and was afforded the opportunity of cross-examination when the witness testified at the preliminary hearing.

Longshore v. Commonwealth, 260 Va. 3, 3-4, 530 S.E.2d 146, 146 (2000) (citing *Shifflett v. Commonwealth,* 218 Va. 25, 28, 235 S.E.2d 316, 318 (1977)).

Thus, our law regarding the admissibility of preliminary hearing testimony has always required unavailability and an opportunity for cross-examination and complies with the new requirements of *Crawford* without alteration.

Within the test set forth by *Longshore,* appellant challenges only the finding of unavailability.[1]

III.

We review a trial court's determination that a witness is unavailable in the context of admitting preliminary hearing testimony under an abuse of discretion standard. *Sapp v. Commonwealth,* 263 Va. 415, 423, 559 S.E.2d 645, 649 (2002).

In *Sapp,* the Supreme Court of Virginia set forth the minimum requirements for declaring a witness who is present but unwilling to testify to be unavailable. The party offering the hearsay testimony "must demonstrate a 'sufficient reason'" for the witness' unavailability. *Id.* at 425, 559 S.E.2d at 650 (quoting *Wise Terminal Co. v. McCormick,* 107 Va. 376, 379, 58 S.E. 584, 585 (1907)). The

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[1] At oral argument, appellant admitted that he had a prior opportunity to cross-examine the witness.

trial court must question the witness on why he will not testify. *Id.* The court should at least order the witness to testify, and "[a]lthough use of contempt powers is clearly subject to the discretion of the trial court, a contempt order in response to continued refusal to testify after being ordered to do so should be carefully considered." *Id.*

The Supreme Court found in *Sapp* that the trial court abused its discretion in declaring the witnesses to be unavailable. There, two witnesses refused to testify, citing "maybe one or two verbal threats" and "just hearing talk here and there in the streets." *Id.* at 420-21, 559 S.E.2d at 647-48. The trial court told the two reluctant witnesses that it would not force them to testify despite the vagueness of these threats and even assured one witness that he would not "be put in jail for refusing to testify." *Id.* at 420-21, 559 S.E.2d at 648. Finding the witnesses to be unavailable, the trial court then admitted their preliminary hearing testimony.

The Supreme Court reversed the decision, however, stating that only "[u]pon persistent refusal to testify despite judicial pressures and an order to testify . . . [may] the testimony of a witness [ ] be declared unavailable." *Id.* at 427, 559 S.E.2d at 651. By assuring one witness "that nothing would happen to him as a result of his refusal to testify and that his prior testimony would be utilized," the trial court had removed "any semblance of judicial pressure." *Id.* at 426-27, 559 S.E.2d at 651.

In this instance, the trial court did order C.S. to testify and placed sufficient judicial pressure upon her to justify the decision declaring her unavailable. Before involving the trial court, the Commonwealth's attorney questioned her as to why she did not feel comfortable

testifying and outlined her mental situation resulting in the decision. The Commonwealth reminded her she was under subpoena and made certain she knew the potential consequences of her actions. Appellant argues that because the trial court did not affirm the witness' statement of the potential consequences or independently state the consequences, the witness was improperly declared unavailable. However, we decline to hold that a trial court abuses its discretion in failing to affirm a witness' *correct* understanding of the situation.

The trial court stressed the importance of the proceedings to C.S. and ordered her to testify. After she again refused to testify, the court placed her in the "lockup" while it considered whether to declare her unavailable. After half an hour, the court again attempted to elicit the testimony and again was rebuffed.

Although the trial court declined to use its contempt power, this does not constitute an abuse of discretion under *Sapp*. The trial court met the requirement of *Sapp* when it ordered C.S. to testify. Further, the court placed C.S. in its "lockup" for at least half an hour, probably the strongest step short of contempt the court could take. Moreover, unlike the trial court in *Sapp,* the court here never acted to remove the "judicial pressure" to testify. Specifically, the court did not tell C.S. that it would not force her to testify, assure her she would not be punished if she continued to refuse to testify, or reveal that it could admit her preliminary hearing testimony. Because we will not require a trial court to use its contempt power to compel testimony, neither will we reverse a court when it has taken other reasonable actions to pressure a witness. Here, the trial court never acted to remove the "judicial pressure" that the Supreme Court has emphasized. Thus,

the trial court did not abuse its discretion when it found C.S.'s testimony was unavailable.

IV.

Having concluded the trial court did not abuse its discretion in finding C.S.'s testimony to be unavailable, we hold the preliminary hearing testimony was properly admitted at trial. Accordingly, we affirm appellant's conviction.

Affirmed.

VIRGINIA: IN THE CIRCUIT COURT
OF THE CITY OF VIRGINIA BEACH

HEARING DATE : 12-03-02
JUDGE : SHOCKLEY

COMMONWEALTH OF VIRGINIA
vs. CASE NO.: CR02-3990
CHRISTOPHER PAUL SCHNEIDER, DEFENDANT
SSN: 089-56-3009
DOB: 07-23-62

INDICTMENT FOR: OFFENSE DATE:
Rape Divers days 4-25-99-4-25-02

Court Reporter: Fiduciary Reporting, Inc.

This day came J. Shirey, attorney for the Commonwealth, the defendant, in person, and L. Cardon, attorney for the defendant.

NOT GUILTY PLEA

The defendant plead NOT GUILTY. With the consent of the defendant, concurred in by the court and the attorney for the Commonwealth, the court heard and determined the case without a jury.

The Commonwealth called the victim in this case as its first witness of the presentation of their evidence. The witness having refused to give testimony, was remanded temporarily into the custody of the sheriff. With the witness again refusing to testify, the court took no action and released the witness into the custody of her guardian.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence.

The defendant's evidence was presented.

After hearing all the evidence, the Court found the defendant GUILTY of Rape, as charged, in violation of § 18.2-61.

REFERRAL TO PROBATION

The Court directed the probation officer of this Court to prepare a presentence report.

The Court continued further proceedings to 02-10-03 for sentencing.

The Clerk shall send a copy of this Order to the:
Probation Office of this Court.
Sheriff of this City.

ENTERED: 12/5/02

/s/ A. Bonwill Shockley
JUDGE

VIRGINIA: IN THE CIRCUIT COURT
OF VIRGINIA BEACH

HEARING DATE : MAY 28, 2003
JUDGE : SHOCKLEY

COMMONWEALTH OF VIRGINIA
vs
CHRISTOPHER PAUL SCHNEIDER, DEFENDANT
SSN : 089-56-3009
DOB : 07-23-62
SEX : MALE

SENTENCING ORDER – CASE NO.: CR02-3990

Attorney for the Commonwealth: J. Shirey
Attorney for the Defendant: M. Stallings & B. Ziegler
Court Reporter: Fiduciary Reporting, Inc.

The defendant was present and represented by counsel.

On December 3, 2002, the defendant was found GUILTY of the following offense(s):

OFFENSE (F/M)	DATE	SECTION
RAPE (F)	DIVERS DAYS FROM 04-25-99 THRU 04-25-02	18.2-61

The presentence report was considered and filed as part of the record in accordance with the provisions of Code § 19.2-299.

The Court denied defendant's motion to set aside the verdict and for a new hearing.

The Court reviewed and considered the applicable discretionary sentencing guidelines and made the completed worksheet a part of the record of the case pursuant to the provisions of Code § 192-298.01.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration in the Virginia Department of Corrections for the term of: 25 years.

The Court **SUSPENDS** 13 years of the sentence conditioned on the following:

1. **Good behavior.** The defendant shall be of good behavior for 25 years.

2. **Supervised Probation.** The defendant is placed on Supervised Probation and the defendant shall comply with all the rules and requirements set by the Probation Officer. Probation shall include sexual offender abuse counseling and/or testing as prescribed by the Probation Officer. LENGTH OF PROBATION: Until released by the Probation Officer. PROBATION TO BEGIN: Upon release from confinement.

3. **Other.** The defendant shall register as a Sex Offender.

4. **SOAP.** The defendant shall participate in the Sex Offender Awareness Program (SOAP), if available, while housed at the Virginia Beach Correctional Center; however defendant shall be released from custody upon completion of jail sentence and/or transport to DOC facility.

Distribution of Copies. The Clerk shall send a copy of this order to the: Sheriff
Director of the Department of Corrections
Probation Office of this Court

Payment after release. $ 805.00 Costs. Payment to be made after defendant's release from confinement.

Credit provision when time to be served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to § 53.1-187.

Substance abuse screening and assessment for felony convictions pursuant to § 18.2-251.01 If the defendant has been convicted of a felony offense, not a capital offense, committed on or after January 1, 2000, the defendant shall complete any substance abuse screening, assessment, testing, and treatment as directed by the Department of Corrections as part of the defendant's sentence. The defendant is subject to payment of all or part of the costs of the program or treatment, excluding the costs of the screening and assessment, based upon the defendant's ability to pay.

The court recommends that the defendant be screened to serve the active period of incarceration at a DOC facility that provides Sex Offender Treatment.

ENTERED: 5/30/03

/s/ A. Bonwill Shockley
JUDGE

Clerk: vbh

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 1st *day of* August, 2006.

Christopher Paul Schneider, Appellant,

against Record No. 060470
Court of Appeals No. 0628-05-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of the City of Virginia Beach shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorney's fee $950.00 plus costs and expenses

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/ Douglas B. Robelen
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 7th *day of* February, 2006.

Christopher Paul Schneider, Appellant,

against Record No. 0628-05-1
Circuit Court No. CR02-3990

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

Before Judges Elder, Clements and Haley

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed. The appellant shall pay to the Commonwealth of Virginia thirty dollars damages.

It is ordered that the trial court allow counsel for the appellant a fee of $725 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

The Commonwealth shall recover of the appellant the amount paid court-appointed counsel to represent him in this proceeding, counsel's costs and necessary direct out-of-pocket expenses, and the fees and costs to be assessed by the clerk of this Court and the clerk of the trial court.

This order shall be certified to the trial court.

Costs due the Commonwealth by
appellant in Court of Appeals of Virginia:

Attorney's fee $725.00 plus costs and expenses

A Copy,

Teste:

Cynthia J. McCoy, Clerk
By: /s/ Marty Ring
Deputy Clerk

No. 06-600

FILED
FEB 12 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

CHRISTOPHER PAUL SCHNEIDER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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February 12, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

When a criminal defendant repeatedly cross-examines a rape victim during a preliminary hearing and when the trial court finds that the rape victim is unavailable for trial, does the Sixth Amendment preclude the admission of the rape victim's preliminary hearing testimony?

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Robert F. McDonnell, on behalf of the Commonwealth of Virginia, responds to the Petition for Writ of Certiorari.[1] For the reasons detailed in this Brief in Opposition, the Petition should be denied.

INTRODUCTION

By "leav[ing] for another day any effort to spell out a comprehensive definition of 'testimonial,'" *Crawford v. Washington*, 541 U.S. 36, 68 (2004), this Court left certain questions unresolved. However, in the area of preliminary hearing testimony, *Crawford* was clear: testimony from a preliminary hearing is inadmissible unless: (1) the witness was unavailable; and (2) the defendant had a prior opportunity to cross-examine the witness. *Id.* at 53-54, 68. In this instance, both conditions are met. First, the trial court reasonably concluded that the rape victim was an unavailable witness. Second, because the rape victim previously testified under oath, because Schneider was present and represented by counsel during the preliminary hearing, and because Schneider had actually cross-examined the rape victim, the trial court concluded that Schneider had a prior opportunity to cross-examine the witness.

Nevertheless, Schneider asks this Court to review the Virginia court's straightforward application of *Crawford*.

[1] On December 12, 2006, this Court directed that a response be filed. On December 22, 2006, this Court extended the time for filing the response to February 12, 2007.

Certiorari should be denied for several reasons. First, Schneider's principal argument to this Court, that admitting preliminary hearing testimony violates the Confrontation Clause, U.S. Const. amend. VI, was never raised in the state courts. Instead, he expressly conceded in the state courts that his sole issue was whether the witness was properly deemed "unavailable." To ensure a fully developed record and out of comity to state courts, this Court has declined to grant certiorari when a party engages in such "bait and switch" tactics. Thus, certiorari is not available to a petitioner seeking review pursuant to 28 U.S.C. § 1257 if he fails to properly present his federal claim.

Second, there is no conflict among the lower courts. A few States have precluded the use of preliminary hearing testimony at trial because, as a matter of *state law*, those courts have concluded that the limited scope of cross-examination at preliminary hearings precludes the use of such testimony at trial. The majority, including Virginia, have held that such testimony is admissible where the defendant had a prior opportunity to cross-examine the witness.

Finally, contrary to Schneider's assertions, there is no need for this Court to review so as to adopt a "uniform standard" for determining when a witness should be deemed unavailable. Schneider does not point to any conflict among the lower courts or offer any reason for this Court to grant certiorari – except his clear desire to escape punishment for his horrendous pattern of the rape of a child. In fact, the wide range of situations that present themselves to the courts, such as the death of a witness, illness, flight, memory loss or feigned memory loss, refusal to cooperate, witness intimidation and other situations militate against any such "uniform standard." With

respect to this issue, Schneider seeks nothing more than an opportunity for error correction. Certiorari should be denied.

STATEMENT

1.a. Schneider began sexually abusing his step-daughter, Christi, when she was thirteen years old. Tr. 10/03/02 at 11, 14. Christi told her therapist that Schneider raped her weekly, except when she was menstruating – when he forced her to perform fellatio on him. Tr. 12/03/02 at 37-38. Over this three year period, Christi tried to physically resist, but was unable to do so. Tr. 10/03/02 at 18. Christi told her mother that she was being abused by Schneider, but her mother did not believe her. Tr. 12/03/02 at 37-38.

Christi reported Schneider's rapes on three different occasions. Tr. 10/03/02 at 14-16; Tr. 12/03/02 at 47-48. However, Schneider was never charged because Christi recanted each time. Tr. 10/03/02 at 14-15; Tr. 12/03/02 at 47-48. Christi explained she had recanted because of pressure from Schneider, her mother's refusal to believe her, and the fact that her mother and her brother loved Schneider and did not want to lose him. Tr. 10/03/02 at 14-16; Tr. 12/03/02 at 47-48.

b. On April 25, 2002, when Christi was sixteen years old, she confided in her therapist, Joyce Costigan, that Schneider had been raping her over a period of years. Tr. 12/03/02 at 33-34, 37, 45. Costigan, who was required by law to do so, told Christi she would have to report the abuse right away. Tr. 12/03/02 at 38, 50. Christi asked Costigan to wait until she had evidence to support her allegation. Tr. 12/03/02 at 50 Christi told Costigan that

her mom would be going away that evening and that Schneider would rape her again that night. Tr. 12/03/02 at 38. Christi had decided to obtain physical evidence to prove the rapes and to persuade her mother of what was occurring. Tr. 10/03/02 at 14, 16; Tr. 12/03/02 at 49-50. Costigan agreed to wait because of Christi's prior recantations, but told Christi she would call that evening to report the abuse. Tr. 12/03/02 at 38, 50.

That evening, when Christi's mother left the house, Schneider told her to come upstairs and sit on the bed. Tr. 10/03/02 at 7. Schneider grabbed her breasts, began kissing and fondling Christi, and then told her to take off her clothes. Tr. 10/03/02 at 7. Christi complied with Schneider's order. Tr. 10/03/02 at 7. Thereafter, he proceeded to have sexual intercourse with her. Tr. 10/03/02 at 7-8. When he was done, he ejaculated on Christi's stomach. Tr. 10/03/02 at 7-9.

Schneider got a washcloth and told her to wipe off her stomach. Tr. 10/03/02 at 9. As she had planned, Christi pretended to wipe the ejaculate off her stomach, tossed the washcloth back to Schneider and put her clothes on. Tr. 10/03/02 at 9. Christi told Schneider she was going to bed, but instead she ran to a neighbor's house where she called Costigan and told her, "He did it. He raped me." Tr. 10/03/02 at 9; Tr. 12/03/02 at 39. Costigan told Christi to stay where she was while Costigan called the police. Tr. 10/03/02 at 9-10; Tr. 12/03/02 at 39.

When the police arrived, the officer noticed "a wet spot with a whitish-type color on her" stomach. Tr. 12/03/02 at 57. Christi had kept Schneider's semen as evidence on her stomach. Tr. 12/03/02 at 57-58, 69-70. The police took Christi to have a rape kit test done and the semen on her

stomach was obtained for DNA analysis. Tr. 10/03/02 at 10; Tr. 12/03/02 55-56, 62, 69-71. The sexual assault nurse examiner also conducted a physical exam. Tr. 12/03/02 at 63. The nurse reported that although the exam was "inconclusive," the tissue on Christi's cervix was irritated and "friable" at the time of the exam. Tr. 12/03/02 at 65. The DNA sample was a conclusive match to Schneider. Tr. 10/03/02 at 19; Tr. 12/03/02 at 32, 72-75; Commonwealth's Exhibit 1. Schneider stipulated to the DNA report at trial. Tr. 12/03/02 at 32.

c. Christi has been diagnosed with bipolar disorder, manic depression and attention deficit hyperactivity disorder. Tr. 12/03/02 at 20. She had been seeing the therapist, Costigan, for approximately two years at the time of the incident. Tr. 12/03/02 at 33, 40. When Christi was nine years old, she was hospitalized for over a year for mental health issues. Tr. 12/03/02 at 20-21. In addition, Christi had been removed from her home in the past because of physical abuse. Tr. 12/03/02 at 98. By the time of trial, Christi had been sent to live with a woman whom she had not met previously and was forced to change schools. Tr. 12/03/02 at 18-20, 96. Meanwhile, Schneider was living in the family home. Tr. 12/03/02 at 95-96.

2. Schneider was charged with rape in violation of *Virginia Code* § 18.2-61. *App.* 9. At the October 3, 2002 preliminary hearing in the Virginia Beach Juvenile and Domestic Relations Court, Christi testified against Schneider. Tr. 10/03/02 at 4-21. Christi testified under oath and was subjected to direct examination, cross-examination, redirect, re-cross, and, after a second redirect, further recross-examination. Tr. 10/03/02 at 4-21.

a. During Schneider's counsel's cross-examination of Christi, he attempted to show that she had initiated the encounter in order to "set up" Schneider.[2] Specifically, counsel asked Christi if she, a sixteen-year-old girl, had "come on" to Schneider that night. Tr. 10/03/02 at 11. Christi denied this allegation. Tr. 10/03/02 at 11. Nevertheless, Christi admitted she had "planned" the April 25, 2002 encounter in advance and told her therapist she was going to do it to gather evidence. Tr. 10/03/02 at 12, 14. Christi explained that her plan was to preserve evidence of Schneider's abuse, "so that it wouldn't happen again." Tr. 10/03/02 at 14, 16. Christi conceded she took off her own clothes and that Schneider did not force, threaten or hurt her. Tr. 10/03/02 at 13. During the preliminary hearing, Christi also admitted she had made similar allegations against Schneider on three prior occasions but had subsequently recanted. Thus, no criminal charges had been brought against Schneider on those occasions. Tr. 10/03/02 at 14-15. On further cross-examination, Christi agreed this particular occasion was "voluntary" and she did not have to go to Schneider's bedroom when he called her. Tr. 10/03/02 at 17-18. Finally, Christi admitted Schneider had never threatened her. Tr. 10/03/02 at 19.

b. At the conclusion of the preliminary hearing, the trial court certified the case to the grand jury. Tr. 10/03/02 at 19.

3. Schneider was tried in a bench trial in the Circuit Court of the City of Virginia Beach. *App.* 9.

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[2] No motivation for such a "set up" was ever suggested either at the preliminary hearing or at trial.

a. At trial, the prosecution produced Christi, who was sworn and answered background questions. Tr. 12/03/02 at 15-16. When asked why she did not have a good relationship with Schneider, Christi stated, "I don't feel comfortable testifying." Tr. 12/03/02 at 16. The prosecutor asked, "Christi, are you saying that you are not going to testify about what has taken place between – or what your stepfather has done with you?" Tr. 12/03/02 at 17. Christi responded, "Yes." Tr. 12/03/02 at 17. The prosecutor stated, "Christi, do you understand that you are under a subpoena which is a court order to testify?" Christi responded, "Yeah." When asked why she would not testify, she stated, "I cannot handle it mentally. I don't think I'm capable of handling it. . . . It's stressful, and I just – it's just hard and I'm not going to do it." Tr. 12/03/02 at 17.

Thereafter, the prosecutor asked Christi, "do you understand that the court can order you directly to testify?" and Christi responded, "Yes, ma'am." Tr. 12/03/02 at 22. Christi affirmed she understood that there were consequences for refusal to testify and that she understood the consequences. Tr. 12/03/02 at 22. When asked what she understood those consequences to be she stated, "Possible fines. Possible [Detention in a Home for Juveniles]." Tr. 12/03/02 at 22. Based upon that response, the prosecutor inquired, "Christi, with that in mind, will you testify today about what took place – what your stepfather has done to you over the past few years?" Tr. 12/03/02 at 21-22. Christi stated, "No, ma'am." Tr. 12/03/02 at 22.

b. At that point, the prosecution asked the court to order Christi to testify. Tr. 12/03/02 at 22. The court said, "Christi, do you understand that the charges here are very serious felony charges?" and Christi acknowledged she understood. Tr. 12/03/02 at 22. The judge told Christi,

"either the allegations you made are true, in which case the court needs to hear what happened; or they're not true, in which case you're in trouble. Do you understand that?" Tr. 12/03/02 at 22. Christi responded, "Yes, ma'am." Tr. 12/03/02 at 22. The trial court continued by asking her, "[D]o you understand that if these things happened, you are not the bad person here?" and Christi stated again, "Yes, ma'am." Tr. 12/03/02 at 22. Ultimately, the trial court demanded, "You need to testify, and I'm ordering you to testify about what happened." Tr. 12/03/02 at 22. In the face of the trial court's order, Christi responded, "I won't do it." Tr. 12/03/02 at 22.

c. In response, the prosecution requested that Christi be declared an unavailable witness, as it was clear that "despite the court's order, she refuses to testify." Tr. 12/03/02 at 22-23. The prosecutor argued:

> [t]he Commonwealth has done everything possible. We have gotten her here. I have met with her in advance. I have explained, as the court could see from her testimony, what the consequences of not testifying would be – or from her statements, I should say – what the consequences of not testifying about her stepfather's actions would be; and yet she still continues to refuse.

Tr. 12/03/02 at 23.

The prosecution moved the trial court to admit the transcript of her prior testimony from the preliminary hearing into the record. Tr. 12/03/02 at 23. In support of the request, the prosecutor noted that the preliminary hearing was under oath, Schneider was present, and "[h]e was represented not only by counsel, but by Mr. Cardon,"

the very same attorney representing him at trial. Tr. 12/03/02 at 23. The prosecutor further argued that:

> [A]s th[e] record will reveal, [defense counsel] had ample opportunity to cross-examine not only about the events of April 25th, but defense counsel opened the door to prior events; and so those matters were discussed. And when I say ample opportunity, I would note that the defense was able to cross-examine, recross, and then recross a second time; so three opportunities to examine.

Tr. 12/03/02 at 23.

Thereafter, the trial court asked defense counsel whether he had any questions for the victim, and defense counsel answered, "I have no questions for her." Tr. 12/03/02 at 24. The court then reviewed the preliminary hearing transcript, specifically to ascertain the extent of the cross-examination conducted. Tr. 12/03/02 at 25, 29-30.

d. Before ruling on the prosecution's motion, however, the trial court attempted to persuade Christi to testify. To that end, the trial court instructed the deputy to take her to the lockup. Tr. 12/03/02 at 25. Once Christi was locked in a cell, the court noted, "maybe a half hour sitting back in a cell will change her mind . . . that will give her a chance to reflect on what she's done." Tr. 12/03/02 at 25. The trial court left Christi in the lockup for thirty-five minutes. Tr. 12/03/02 at 26. The trial court brought her out and told her, "Christi it's been about . . . thirty five minutes since you've been in the back. Have you changed your mind?" The witness responded "No, ma'am." Tr. 12/03/02 at 26. The trial court went on to ask "So you still refuse to testify?" She replied "Yes ma'am." Tr. 12/03/02 at 26.

The trial court once again asked the prosecution and defense counsel whether either of them had any questions for the witness. Tr. 12/03/02 at 26-27. Neither the prosecutor nor defense counsel had any questions for Christi. Tr. 12/03/02 at 27. Nonetheless, the trial court sent Christi back to the lockup once more – where she remained until the conclusion of the trial. Tr. 12/03/02 at 27, 115-16.

e. While Christi was in the lockup, the trial court, defense counsel and the prosecutor reviewed relevant case law and after doing so, defense counsel admitted that, "in reviewing these cases, it looks like it comes down to the discretion of the court – what the court decides it should do." Tr. 12/03/02 at 27. Although defense counsel said it was important that he be permitted to cross-examine Christi, he never attempted to do so and did not proffer to the trial court the alleged inconsistencies with her preliminary hearing testimony or the substance of the allegedly new information. Tr. 12/03/02 at 27-28. Indeed, counsel specifically stated he did not have any questions for Christi when offered the opportunity by the trial court. Tr. 12/03/02 at 24, 27. After further argument of counsel, the trial court determined Christi was, in fact, unavailable. Tr. 12/03/02 at 29. The trial court found that Christi's testimony at the preliminary hearing was given under oath; that it was accurately recorded by transcript; that Schneider was present at the preliminary hearing and represented by counsel; and that he was afforded the opportunity of cross-examination when Christi testified at the preliminary hearing. Tr. 12/03/02 at 28. Thus, the trial court found that Christi was unavailable for trial and received into evidence the transcript of her preliminary hearing testimony. Tr. 12/03/02 at 27-31.

f. At the conclusion of the bench trial, the trial court convicted Schneider, *App.* 10, and subsequently sentenced him to serve twenty-five years in prison, with thirteen years suspended. *App.* 12.

4. Schneider appealed to Virginia's intermediate appellate court. The focal point of his appeal was his argument that the trial court erred in concluding that Christi was unavailable to testify and, therefore, his rights under the Confrontation Clause were violated. By published opinion, the Court of Appeals of Virginia affirmed his convictions. *App.* 1-8. The intermediate appellate court noted that even prior to this Court's decision in *Crawford*, Virginia required the prosecution to show "unavailability and an opportunity for cross-examination" before testimony from a preliminary hearing could be admitted at trial. *App.* 5. The tribunal also observed that Schneider conceded he had had a prior opportunity to cross-examine the witness. *App.* 5. Ultimately, the appellate court held that Christi's repeated refusals to testify despite the trial court's order that she testify, combined with her being placed for a time in the lockup, rendered her unavailable. Therefore, under the Virginia state law precedent, the trial court properly deemed her unavailable and permitted the prosecution to adduce the preliminary hearing testimony. *App.* 5-8.

5. Schneider then sought discretionary review by the Supreme Court of Virginia. On August 1, 2006, by unpublished order without explanation, that court refused the petition for appeal. *App.* 14. The Petition for Certiorari followed.

REASONS FOR DENYING THE PETITION

The Petition should be denied for three reasons. First, Schneider did not present his current federal claim – that the Confrontation Clause precludes the prosecution from employing preliminary hearing testimony at trial – in the lower courts. Second, there is no conflict among the lower courts regarding *Crawford*'s application to the use of preliminary hearing testimony. Third, Schneider presents this Court no reason to review the state courts' determination regarding the unavailability of the witness. For all these reasons, certiorari should be denied.

I. SCHNEIDER NEVER RAISED HIS CURRENT ATTACK ON THE ADMISSIBILITY OF PRELIMINARY HEARING TESTIMONY IN STATE COURT.

In his Petition for Certiorari, Schneider devotes the majority of his argument to a general attack on the admissibility of preliminary hearing testimony in a trial. Pet. at 6-11. However, he never raised those contentions in state court. Instead, he focused exclusively on whether the trial court correctly found the victim to be an unavailable witness. He conceded he had the opportunity to cross-examine the victim at the preliminary hearing.

With "very rare exceptions," when reviewing state-court judgments under 28 U.S.C. § 1257, this Court will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision a petitioner asks this Court to review. *Adams v. Robertson,* 520 U.S. 83, 86 (1997) (per curiam); *Yee v. Escondido*, 503 U.S. 519, 533 (1992). Moreover, this Court's Rules require the petitioner

to specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts." SUP. CT. R. 14.1(g)(i). Applying these principles, this Court "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). *See also University of California Regents v. Bakke*, 438 U.S. 265, 283 (1978) (Powell, J., announcing the judgment of the Court); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Moore v. Illinois*, 408 U.S. 786, 799 (1972); *Stanley v. Illinois*, 405 U.S. 645, 658, n.10 (1972); *Hill v. California*, 401 U.S. 797 (1971). Requiring a party to present the argument to the state courts before seeking certiorari not only respects the comity that the States and National Government owe each other, it also ensures that the record is adequately developed to enable this Court to address the issues presented. *See Webb v. Webb*, 451 U.S. 493, 500-01 (1981).

While Schneider did raise a Confrontation Clause issue on appeal – whether the victim was unavailable – he never contended in state court that the preliminary hearing testimony should not be admitted in a criminal trial. *App.* 1-8. In fact, Schneider expressly and repeatedly limited the scope of his Confrontation Clause challenge to whether the trial court properly determined that the victim was an unavailable witness. *See* Def.'s Br. Supp. Mot. to Set Aside Finding of Guilty at 5, *Commonwealth v. Schneider*, No. CR02-3390; Tr. 5/28/03 at 9; *App.* 1, 5; Petition for Appeal at 6, *Schneider v. Commonwealth*, No. 060470 (Va. Aug. 1, 2006). Indeed, the first sentence of the

lower court's opinion makes plain the manner in which Schneider framed the issue for the state court: "The *sole* issue here for determination is whether the trial court erred in finding a witness was 'unavailable' and in consequently admitting into evidence a transcript of her preliminary hearing testimony at trial." *App.* 1 (emphasis added). In its analysis of the case, the court below reiterated that "appellant challenges only the finding of unavailability" and the court limited its ruling to that issue. *App.* 5. "When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Board of Dirs. of Rotary Int'l v. Rotary Club,* 481 U.S. 537, 550 (1987) (internal quotations and citations omitted). Because Schneider expressly limited his Confrontation challenge in state court, he cannot raise a different challenge in this Court.[3]

Moreover, the record belies Schneider's suggestion that he did not have a meaningful opportunity to cross-examine Christi at the preliminary hearing. Schneider's counsel engaged in no less than three rounds of questioning. Tr. 10/03/02 at 11-13, 16-19. Notwithstanding Schneider's assertions to the contrary, Pet. at 8, Christi's prior

[3] Furthermore, given Schneider's express concession in the trial court that he was contesting only the determination of "unavailability," Virginia's appellate courts would not have considered the issues he now seeks to raise in this Court. *See* VIRGINIA SUP. CT. R. 5:25; 5A:18. Thus, the State's procedural rules provide an independent and adequate state law ground for not considering the question presented. *See Hathorn v. Lovorn,* 457 U.S. 255, 262 (1982) (noting failure to comply with a state procedural rule may constitute an independent and adequate state ground barring review of a federal question).

recantations of similar allegations were revealed and the reasons for those recantations explored at the preliminary hearing. Christi admitted she had recanted three times prior to the report giving rise to the instant conviction. Tr. 10/03/02 at 14-15. Indeed, the trial court expressly noted these recantations in pronouncing sentence. Tr. 5/28/03 at 76. In addition, his suggestion that he did not discover (or could not have discovered in the exercise of reasonable diligence) that Sheila Richards had impeachment information prior to the preliminary hearing strains credulity. Pet. at 8. The record discloses that Christi allegedly "bragged" to Richards that she had "set him up" nearly six months prior to the preliminary hearing. Tr. 12/03/02 at 86-87. Richards, Christi's mother's self-described "best friend," was surely someone known to Schneider. Tr. 12/03/02 at 84. It is unlikely that defense counsel's use of the phrase "set up" during his cross-examination of Christi was coincidental. Tr. 10/03/02 at 12.

Finally, the trial court asked Schneider's counsel not once, but twice, whether he had any questions for Christi before declaring her unavailable. Tr. 12/03/02 at 24, 26-27. Each time, counsel responded that he had no questions. Tr. 12/03/02 at 24, 27. Having expressly declined the opportunity to put any questions to Christi, Schneider should not now be heard to complain that he was unable to do so.

Given Schneider's failure to present his general attack on the admissibility of preliminary hearing testimony in the state courts, this case represents a poor vehicle to address Schneider's argument. Moreover, the record does not support his factual contentions. Therefore, certiorari should be denied.

II. THERE IS NO CONFLICT AMONG THE LOWER COURTS REGARDING THE ADMISSIBILITY OF PRELIMINARY HEARING TESTIMONY UNDER *CRAWFORD*.

A. *Crawford* Is Clear Regarding the Use of Preliminary Hearing Testimony.

In *Crawford*, this Court revisited its framework for analyzing Confrontation Clause issues. The Court held that to admit into evidence the "testimonial" prior statements of a witness, there must be "unavailability and a prior opportunity for cross-examination." 541 U.S. at 68. Although the Court declined to fashion a definition of the term testimonial, it unequivocally included preliminary hearing testimony as falling within the definition of testimonial statements. *Id.* Thus, in the area of preliminary hearing testimony, no new rule was announced. While disavowing the reasoning of *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court embraced the outcome of its prior cases. *Id.* at 59.

California v. Green, 399 U.S. 149 (1970), is dispositive of the case at bar. In *Green*, the Court held that the preliminary hearing testimony of a witness who suffered a "memory lapse" at trial was admissible. *Id.* at 165. The Court found that the witness's statement was

> given under circumstances closely approximating those that surround the typical trial. [The witness] was under oath; respondent was represented by counsel – the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine [the witness] as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.

Id. at 165. The Court acknowledged the difference between a preliminary hearing and a trial, but concluded that "in the present case, respondent's counsel does not appear to have been significantly limited in any way in the scope or nature of his cross-examination of the witness . . . at the preliminary hearing." *Id.* at 166.

Under longstanding precedent, the witness in the case at bar was correctly deemed "unavailable" to testify at trial and Schneider had an extensive opportunity to cross, re-cross and re-re-cross the witness at the preliminary hearing. Therefore, Schneider's Confrontation rights were not violated when the trial court considered the preliminary hearing testimony.

B. The States Have Been Consistent in Their Application of *Crawford*'s Principles to Preliminary Hearing Testimony.

Schneider contends that there is a split among the States regarding the admissibility of preliminary hearing testimony. Pet. at 9. In fact, there is no conflict. The States admit or exclude preliminary hearing testimony depending on the scope afforded for cross-examination at such hearings under state law. Where, as here, defense counsel is afforded a full opportunity to cross-examine, States have permitted the admission of preliminary hearing testimony for a witness who has become unavailable. *See New Mexico v. Henderson*, 136 P.3d 1005, 1010 (N.M. App.), *cert. denied,* 127 S. Ct. 503 (2006) (preliminary hearing testimony properly admitted because defendant "was given an unrestricted right to cross-examine the statements [the witness] gave at the preliminary hearing which were later admitted at trial. This satisfied *Crawford*."); *Kansas v. Young*, 87 P.3d 308, 316-17 (Kan.

2004) (preliminary hearing testimony admissible because defendant had the opportunity to cross-examine); *Primeaux v. Oklahoma*, 88 P.3d 893, 905 (Okla. App.), *cert. denied*, 543 U.S. 944 (2004) (preliminary hearing testimony is admissible where such "'testimony was given under circumstances which closely approximated those of a typical trial'") (citation omitted).

In contrast, where state law limits a criminal defendant's ability or opportunity to cross-examine, courts have adhered to the strictures of *Crawford* and declined to admit such testimony. *See Wisconsin v. Stuart*, 695 N.W.2d 259, 266 (Wis. 2005) (holding that because state law limited cross-examination to issues of plausibility, not credibility, use of preliminary hearing testimony at a later trial creates a Confrontation Clause problem); *Colorado v. Fry*, 92 P.3d 970, 977 (Colo. 2004) (holding that because "the opportunity for cross-examination at a preliminary hearing is very limited" under Colorado law, the admission of preliminary hearing testimony was impermissible).

New Mexico's intermediate appellate court recognized that the decisions in *Fry* and *Stuart* hinged on the state law restrictions for preliminary hearings in Colorado and Wisconsin. That court noted that *Fry* and *Stuart* "are not contrary to our holding here [admitting the preliminary hearing testimony of an unavailable witness] because both relied on the fact that the applicable procedural rules governing preliminary hearings barred the defendant from fully cross-examining the witness, particularly on matters of credibility." *Henderson*, 136 P.3d at 1010. Most recently, in *Washington v. Mohamed*, 130 P.3d 401, 403 (Wash. App. 2006), Washington's intermediate appellate court held that the pretrial hearing at issue was not limited like the one in *Fry*, because the defendant had ample opportunity at

the preliminary hearing to examine the witness who was unavailable at trial. *Mohamed*, 130 P.3d at 404.

Stated differently, courts look at the latitude afforded by state law during the preliminary hearing cross-examination and determine whether the prior testimony of an unavailable witness can be admitted. The trial judge in the case at bar actually took this precaution to evaluate the scope of the cross-examination at the preliminary hearing before the prosecution was permitted to introduce Christi's prior testimony into evidence. Tr. 12/03/02 at 25, 29-30. Careful examination of the cases shows that the "split" imagined by Schneider is in reality a function of differences in state law, rather than a divergence of opinion concerning this Court's holding in *Crawford*. With respect to preliminary hearing testimony, *Crawford* is clear and States have adhered to its strictures. Schneider offers a solution in search of a problem. No further amplification or clarification is required.

Schneider offers a number of policy arguments in support of his contention that preliminary hearing testimony should *never* be admitted. His arguments, however, contradict settled – and recently reaffirmed – precedent. Indeed, Schneider's arguments would result in nothing less than overruling *Crawford*, *Green*, and *Mattox v. United States*, 156 U.S. 237 (1895). Schneider notes that witness examinations at preliminary hearings are often less searching than at trial.[4] Pet. at 6. The Court

[4] Schneider also complains that the timing of discovery may preclude inquiry on a particular topic. However, a defendant has no constitutional right to discovery. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Discovery was unknown at the time of the Framing. It is the

(Continued on following page)

acknowledged this obvious fact in *Green*, but concluded that if a defendant is afforded broad opportunity to cross-examine, there is no reason why the preliminary hearing testimony should be excluded if the witness later becomes unavailable. *Green*, 399 U.S. at 166. Where, as here, a criminal defendant is given extensive opportunity for cross-examination at the preliminary hearing, "nothing in the Confrontation Clause prohibit[s] the State" from relying on the prior testimony to prove its case against the defendant. *Id.* at 168.

Schneider also contends that use of the preliminary hearing testimony deprives the fact finder at trial of the opportunity to observe the witness's demeanor and precludes a defendant from questioning a witness if new facts are developed either in discovery or through independent investigation. Pet. at 6-8. Of course, that is true in every instance where prior testimony is employed. Taking this argument to its logical conclusion, prior testimony, even from a prior trial, could never be adduced once a witness becomes unavailable. In addition, the fact finder in this case plainly had the opportunity to observe Christi. What is more, the trial judge was so concerned with Christi's emotional state, that she had Christi's therapist meet with her at the conclusion of the trial. Tr. 12/03/02 at 29, 52, 67, 100-01. Therefore, this case simply does not provide an opportunity to determine the parameters of this potential shortcoming.

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opportunity to cross-examine that matters for constitutional purposes, not the timing of discovery disclosures. Essentially, Schneider seeks to constitutionalize an enhanced opportunity for cross-examination based on non-constitutional discovery rules.

More importantly, this Court has long recognized that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). Thus, more than a century ago the Court was mindful that

> [G]eneral rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law, in its wisdom, declares that the rights of the public shall not be *wholly* sacrificed in order that an incidental benefit may be preserved to the accused.

Mattox, 156 U.S. at 243 (emphasis added). "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Id.* at 244.

Schneider also claims that "allowing preliminary hearing testimony to be admitted in lieu of actual testimony at trial sets a dangerous precedent ripe for abuse." Pet. at 9. This Court has explicitly endorsed the use of preliminary hearing testimony, provided the defendant has been afforded the opportunity to cross-examine, since 1970. *Green*, 399 U.S. at 149. Schneider does not show, and the respondent is not aware of, any such cases, let alone an epidemic of unscrupulous prosecutors who are circumventing the Confrontation

Clause through the inappropriate use of preliminary hearing testimony. More fundamentally, a defendant who was able to fully cross-examine the victim, as in the case at bar, has received his constitutional due.[6]

This Court's jurisprudence provides proper safeguards for a defendant's right to confront witnesses in preliminary hearings. That standard has been correctly and consistently applied by the States. The Petition for Certiorari should be denied.

III. SCHNEIDER OFFERS NO REASON FOR THIS COURT TO GRANT HIS PETITION ON THE LIMITED ISSUE THAT HE ACTUALLY RAISED BELOW.

The final portion of the Petition invites the Court to "adopt a uniform standard for determining when a witness is 'unavailable.'" Pet. at 14. Schneider contends that the trial court erred in concluding that the victim in his case was "unavailable." He suggests that "death or some other meritorious reason" should constitute the standard for "unavailability." Pet. at 9. Unlike his other arguments, Schneider did raise this issue in state court. However, his contentions are without merit.

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[6] Schneider's petition also ignores the natural consequences that would flow from the adoption of his proposed rule. If the prosecution could never present preliminary hearing testimony, it would create an incentive to ensure the silence of prosecution witnesses through intimidation or worse.

A. There Is No Demonstrated Need For a "Uniform Standard."

At the threshold, Schneider does not demonstrate any reason for this Court to address this issue. He has not articulated any conflict among the lower courts on this issue or shown that this is an area in which guidance from this Court is needed. Furthermore, Schneider's suggested approach contravenes the holding in *Green*. In *Green*, this Court held that the Confrontation Clause does not bar the use of preliminary hearing testimony in the face of a witness's claimed loss of memory, claim of privilege or *simple refusal to answer*, provided the preliminary hearing afforded the defendant an opportunity to cross-examine the witness. *Id.* at 167-68 (emphasis added).

Finally, as a conceptual matter, Schneider's suggested (but unarticulated) "uniform standard" is unsuitable for an area of the law that requires flexibility. When a reliable source testifies that a particular witness has died or left the country, such testimony should ordinarily suffice for a finding of unavailability. Other situations may require a more searching inquiry of the facts to ensure a witness is truly unavailable. For example, a hardened criminal may need significant pressure from a court to determine that he truly refuses to testify and thus be declared unavailable. In contrast, a young girl, such as the rape victim in this case, may require less pressure before the trial court is assured the witness truly refuses to testify. Each case must turn on its own facts and circumstances. The trial courts, which have the opportunity to see the witness, are the appropriate fora to determine whether a witness is unavailable and should be vested with the discretion to make that determination.

B. There Was No Error in This Case.

Schneider further argues that the trial court should have exercised its contempt power or should have placed Christi in custody for a more "meaningful" period. Pet. at 12-13. Schneider's arguments on this point expose his Petition for what it is: a request that this Court intervene to engage in routine error-correction.

Reviewing routine cases for error-correction is not the function of this Court. A writ of certiorari will be granted only for "compelling reasons." SUP. CT. R. 10. Although Virginia maintains no error occurred, at most, Schneider's claim is nothing more than "the misapplication of a properly stated rule of law." *Id.* Such petitions are "rarely granted," *id.,* because this Court simply cannot devote itself to case-specific error correction. *See Tory v. Cochran*, 544 U.S. 734, 739 (2005) (Thomas, J., joined by Scalia, J., dissenting) (noting that the Court does not grant review for "case-specific error correction"); *Overton v. Ohio,* 534 U.S. 982, 985 (2001) (Breyer, J.) (statement respecting denial of certiorari) (noting that it is "axiomatic that this Court cannot devote itself to error correction . . . ."); *Calderon v. Thompson,* 523 U.S. 538, 569 (1998) (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting) (same).

Even if this Court were tempted to engage in such routine appellate review, no abuse of discretion occurred in the case at bar. The prosecution produced the witness and she was sworn. Therefore, the case at bar is unlike the situation in *Barber v. Page*, 390 U.S. 719, 724-25 (1968) (holding witness cannot be declared unavailable where the

prosecution has made no effort to secure the presence of the witness).

Christi, a seventeen-year-old girl, refused to testify. She explained her refusal, stating "I cannot handle it mentally. I don't think I'm capable of handling it." Tr. 12/03/02 at 17. She noted "[i]t's stressful, and I just – it's just hard; and I'm not going to do it." Tr. 12/03/02 at 17. The prosecutor asked her a number of questions about her situation and asked her if she understood there could be consequences for not testifying. Tr. 12/03/02 at 17-22. The court also questioned the witness and ordered her to testify. Tr. 12/03/02 at 22. The prosecutor asked the court to declare that the witness was unavailable. Tr. 12/03/02 at 22-23. The court refused, and sent the witness to the lockup. Tr. 12/03/02 at 25. After allowing seventeen-year-old Christi to sit in a cell for over half-an-hour, the court again inquired of Christi whether she would testify and again she refused. Tr. 12/03/02 at 26. At that point, the court declared the witness was unavailable but, in fact, held her in lockup for the duration of the trial. Tr. 12/03/02 at 27-29, 100-01, 115-16.

Schneider's suggestion that the trial court should have treated this seventeen-year-old victim more harshly before declaring her unavailable is unsupported by the record. Pet. at 13. The record reveals Christi was visibly upset and tearful at both the preliminary hearing and trial. Tr. 10/03/02 at 15; Tr. 12/03/02 at 29. At the hearing on Schneider's motion to set aside the finding of guilt, the trial court noted "[t]his is someone who's having problems, who's not living at home, who's living with another family." Tr. 5/28/03 at 29. The court also reiterated:

> She refused to testify. She was aware of the penalties for refusing to testify. She was ordered by the court to testify. She was taken in the back to lockup, given a chance to think about it, brought back out in the courtroom again and asked if she would testify; and she refused to testify again. That is sufficient pressure to . . . find her unavailable.

Tr. 5/28/03 at 33-34. The trial court's conclusion that the witness was unavailable under these circumstances constituted a reasonable exercise of the court's discretion.

Under the decision in *Sapp v. Virginia*, 559 S.E.2d 645, 649 (Va. 2002), a trial court must exert judicial pressure upon a witness who refuses to testify. This holding is consistent with FED. R. EVID. 804(a)(2), which allows a court to find a witness unavailable where the witness refuses to testify despite a court order. The plain text of the federal rule does not require a court to hold the witness in contempt. There is no reason state courts should be required to reflexively deploy the sledgehammer of contempt before declaring a witness unavailable. Nor is there any reason to grant certiorari to review a routine case based upon settled principles of law.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **DENIED**.

Respectfully submitted,

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